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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF AMICUS CURIAE

I. PETITIONER'S RIGHT TO JUDICIAL REVIEW OF HIS DRAFT CLASSIFICATION IS ESTABLISHED BY THE JUDICIAL REVIEW PROVISION OF THE MILITARY SELECTIVE SERVICE ACT OF 1967.

The case at bar arose upon McGee's refusal to submit to induction on January 29, 1968. The case is therefore governed by the Military Selective Service Act of 1967. [50 U.S.C.App. §§451 et seq.]

That act contains the following new provision not found in any previous Selective Service law:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.
>
> [50 U.S.C. App. §460(b)(3).][1]

The Solicitor General does not deny that petitioner sought judicial review of his classification (a) "in defense to a criminal prosecution, instituted under section 12 of this title" and (b) after he "responded . . . negatively to an order to report for induction." Having met the prescribed conditions, petitioner was thus entitled to judicial review of his classification, by statute.

The Solicitor General apparently concedes, *sub silentio,* that the statute in question affirmatively provides for judicial review of the classification in the case at bar, for he makes no contention to the contrary.

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[1]This provision embodies the rule of *Falbo v. United States,* 320 U.S. 549 (1944) that judicial review of draft board action is to be deferred until the end of the selection process, "after the registrant has responded . . . negatively to an order to report for induction". The *Falbo* decision is analyzed in Appendix A hereto.

In essence, then, the Solicitor General argues that, in cases where the draft classification has not been appealed, a Federal Court should decline to exercise the jurisdiction which it has by statute. This argument conflicts with the fundamental obligation of the Federal Courts recognized since the time of Chief Justice John Marshall, to exercise jurisdiction which is given. *Cohens v. Virginia,* 6 Wheat. (5 U.S.) 264, 404 (1821):

> It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.

Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909):

> "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."

Meredith v. City of Winter Haven, 320 U.S. 228 (1943); *Propper v. Clark,* 337 U.S. 472, 492 (1949); *Allegheny County v. Frank Mashuda,* 360 U.S. 185, 188-189. *Mach-tronics, Incorporated v. Zirpoli,* 316 F.2d 820, 824 (9th Cir. 1963):

> It has long been recognized that when a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.

Moreover, even if it could be somehow shown why the Federal Courts should decline to exercise their

statutory jurisdiction to review Selective Service orders in cases like the one at bar, should not the same considerations induce judicial declination to exercise their jurisdiction to enforce such orders? If the administrative process be deemed abortive for purposes of review, it should be likewise deemed abortive for purposes of enforcement, especially since the State Director has power at any time to appeal any classification [32 C.F.R. 1626.1,[2] 1655.20] and conducts routine pre-indictment review of all conscientious objector cases [Local Board Memorandum No. 14, section 9]. The State Director should not be permitted to invoke the jurisdiction of a Federal Court under 50 U.S.C. App. §460(b)(3) to enforce an administrative order while at the same time urging the court to abdicate an essential element of that jurisdiction, viz., judicial review of the order sought to be enforced. To the extent he is successful in invoking such one-way jurisdiction, the courts will become a rubber stamp for any agency action, however illegal. [Section II, *infra.*]

Most of the cases relied on by the Solicitor General are not in point because they arose under prior stat-

[2]The continuing existence of this option refutes the contention of the Solicitor General that McGee deprived Selective Service of the opportunity to appeal. In fact, the Solicitor General has failed to show any prejudice whatever suffered by the Government. The "expenditure of countless hours by prosecutors, grand and petit jurors, and judges" must be laid to the local board which classified McGee without any factual basis and unlawfully ordered him inducted. It cannot be charged to McGee. The nearest the Solicitor General can come to showing prejudice is to speculate that if McGee had appealed he might have been exempted from military service. Thus, the argument boils down to this: "We acted illegally when we ordered McGee inducted, but he must be punished anyway because we might not have done so."

utes which contained no provision whatever for judicial review. This includes *McKart v. United States*, 395 U.S. 185 (1969), and all the Court of Appeals decisions cited in Respondent's Brief at page 19, note 9. In those cases the courts were faced with the problem of determining the availability and timing of judicial review in the absence of any express statutory provision for such review. They are not relevant to the case at bar because the 1967 Act specifically authorizes precisely the judicial review sought by petitioner.[3]

The only case cited by the Solicitor General involving the availability of post-induction order judicial review under the 1967 Act is *Lockhart v. United States*, 420 F.2d 1143 (9th Cir. 1969). In that case it was held that Lockhart was barred from presenting a basis in fact defense to a criminal prosecution under the 1967 Act because he had not appealed his classification. The majority opinion does not cite, discuss or analyze the judicial review provision of the 1967 Act.[4] It simply follows principles laid down under prior statutes which did not provide for judicial review at all. The decision is clearly erroneous. It denies due process by forfeiting a criminal defense without notice. It invades the legislative arena by, in effect, making failure to appeal a criminal offense. It

[3]The Solicitor General asserts that petitioner is "asking the courts to substitute themselves for the . . . administrative agency . . . " [Resp.Br. pp. 28-29.] Not so. Petitioner only seeks a judicial determination whether there is any basis in fact for his classification, an issue precisely within the scope of review prescribed by Congress.

[4]Only Judge Browning's dissent (concurred in by Judge Hamley) examines the governing statutory provision.

violates the duty of the judiciary to exercise jurisdiction which it has by law. It places an agency of the executive branch above the law by removing the only effective check on its lawless acts. Worst of all, it sends to prison an innocent man without giving him his day in court.

II. THE POSITION URGED BY THE SOLICITOR GENERAL WOULD CREATE AN IMBALANCE OF POWERS AMONG THE THREE BRANCHES OF GOVERNMENT, PLACING AN AGENCY OF THE EXECUTIVE BRANCH ABOVE THE LAW.

The decision below involves a judicial entry into the sphere of the legislative branch of government. The court below reviewed McGee's classification, concluding that McGee had established his right to exemption from military service, and that the local board had no basis in fact for classifying him I-A. [Petition for Certiorari, pp. 11a-12a.] It follows that the induction order was illegal. *Estep v. United States,* 327 U.S. 114 (1946). Thus, the imposition of criminal punishment pursuant to count one rests in actuality not on violation of 50 U.S.C. App. section 462(a) (which was not proved),[5] but on McGee's

[5]Since the Government's own evidence (the Selective Service file) showed that the induction order had no basis in fact, there was a failure of proof of the alleged refusal to submit to induction. Irrespective of a waiver of the right to defend, a District Court must always, absent a plea of guilty, insist on proof of the crime charged, beyond a reasonable doubt. In cases where an exemption claim has been rejected by the local board, this must include proof of a basis in fact to support the action of the board. This necessarily follows from the rule that a basis in fact is an indispensable element of local board jurisdiction. *Estep, supra,* at 122-23.

failure to take an adminstrative appeal from his I-A classification. The Solicitor General concedes that there is no statute which requires a draft registrant to appeal. [Resp. Br. p. 21, n. 11] Nor is there any regulation which requires a draft registrant to appeal.

In this analysis the imposition of criminal punishment by the court below, pursuant to count one, involves the creation by the judiciary of a new crime, i.e., failure to take an administrative appeal from a draft classification. This violates the fundamental policy of our jurisprudence that it is for the Congress to prescribe what conduct shall be prohibited or compelled on pain of criminal punishment. "Crimes against the United States must be made so by Congressional Act."[6] *United States v. Hudson and Goodwin,* 7 Cranch (11 U.S.) 32 (1813); *United States v. Coolidge,* 1 Wheat. (14 U.S.) 415 (1816); *United States v. Eaton,* 144 U.S. 677, 688 (1892): "It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense."[7]

A much more serious imbalance of powers is also involved in the position urged by the Solicitor Gen-

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[6]Jackson, *The Supreme Court in the American System of Government,* Harper Ed. (1963) p. 31.

[7]The imposition of criminal punishment for conduct not proscribed by a statute "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties * * * violates the first essential of due process of law." *Connally v. General Const. Co.,* 269 U.S. 385 (1926). Cf. *United States v. Five Gambling Services,* 346 U.S. 441, 452-453 (1953).

eral. He contends that this Court should enforce an administrative order even though it is devoid of evidentiary support.

A similar contention was made by the Attorney General many years ago. *Interstate Commerce Commission v. Louisville and Nashville Railroad Company,* 227 U.S. 88 (1913). There the argument was made that an order of the Interstate Commerce Commission, setting aside railroad rates which it deemed unreasonable, was conclusive on the courts even if the finding was wholly without substantial evidence to support it.[8] This Court replied as follows:

> A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> [227 U.S. at 91.]

When a Federal Court lends its power and prestige to the enforcement of an unlawful administrative

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[8]Justice Jackson considered this to be "[P]erhaps the most extreme argument" made for administrative autonomy. *Op. cit. supra,* n. 6, at 48.

order, as the court below did, it sanctions unchecked action by an agency of the executive branch of government, and abdicates the most sacred obligation of the judiciary: to stand as a bulwark against unwarranted or oppressive treatment by the executive branch of any citizen, however lowly.

III. THE SOLICITOR GENERAL IMPLICITLY CONCEDES THAT THE DECISION BELOW DENIES DUE PROCESS.

The Solicitor General states that when McGee was classified he was notified "that he had a right to . . . take an appeal within 30 days". [Resp.Br. p. 8] Conspicuously, he omits any assertion that Selective Service ever informed McGee that unless he took an appeal he might forfeit his right to defend against subsequent criminal charges. The absence of such notice is fatal. Due process requires notice and hearing; necessarily it requires notice before forfeiture of the right to defend a criminal case, since such a deprivation includes forfeiture of all the rights guaranteed by the Sixth Amendment. That is why such forfeiture must necessarily be grounded on waiver principles.

The Solicitor General states that "It might be that the present situation should be conceptualized in terms of waiver rather than 'exhaustion' . . ." [Resp. Br. p. 32, n. 20]. Since he does not point to any evidence or any finding in the case at bar that peti-

tioner waived his right to defend, that concession is apparently conclusive.[9]

IV. THE PURPOSE OF THE EXHAUSTION RULE CAN BE ACCOMPLISHED BY APPROPRIATE INTERLOCUTORY ORDERS IN THE TRIAL COURT.

The purposes of the exhaustion rule urged by the Solicitor General can be accomplished, consistent with constitutional traditions and fairness of procedure, by appropriate interlocutory orders in the trial courts.

When a draft prosecution is initiated the District Court can ascertain at an appropriate pre-trial stage (a) whether there will be a defense of misclassification, and (b) whether an administrative appeal has been taken. If the District Court finds that there will be such defense and that there has been no administrative appeal, it can order the prosecution held in abeyance pending a review of the Selective Service file by the State Director.[10] The United States Attorney can be informed that if he declines to take advantage of that review he will be held to have waived

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[9]The reference to *Yakus v. United States*, 321 U.S. 414 (Resp. Br. p. 32, fn. 20) is inapposite because the legislation here involved does not purport to make "criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity." Other distinctions between *Yakus* and this case are discussed in Appendix B hereto.

[10]This would amount to asserting jurisdiction but deferring its full exercise pending exhaustion of administrative remedies which may be available, the normal, fair and orderly practice. E.g., *Covington v. Schwartz*, 230 F.Supp. 249 (N.D.Cal. 1964), aff'd *Schwartz v. Covington*, 341 F.2d 537 (9th Cir. 1965).

any objection to the absence of an administrative appeal.

Upon review by the State Director, he has plenary power to order the case appealed to the appeal board. 32 C.F.R. §§1626.1, 1655.20.[11] If the appeal board should decide in the registrant's favor, the case before the court would become moot; if the appeal board should decide adversely to the registrant, the prosecution would proceed.

This approach would have a number of advantages: (1) it would give Selective Service another opportunity to subject exemption claims to meaningful review; (2) it would avoid the due process problems involved in a forfeiture, without notice, of the right to defend; (3) it would leave the statutory structure of the law unchanged; (4) it would prevent the wholesale bypass of administrative appeals feared by the Solicitor General [Resp. Br. pp. 29-30]; (5) it might terminate a number of cases at the pre-trial stage, and thus reduce the burden on the courts; (6) it would involve deferment rather than abdication of jurisdiction.

There is one other advantage over the rule urged by the Solicitor General. His rule would tend to promote appeals in every case where an exemption or deferment claim is rejected by a local board. Since only about one-third of all registrants classified I-A are actually called for induction, two-thirds of the

[11]Alternatively, he is empowered to order a reopening by the local board, which would thereupon be required to cancel the induction order. 32 C.F.R. §1625.3(a).

appeals would be a waste of time, placing an unnecessary burden on the appeals boards.

CONCLUSION

To permit punishment without hearing would defeat a basic element of the liberty we seek to defend. Therefore, the decision of the court below must be reversed.

Dated, San Francisco, California,
January 25, 1971.

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(Appendices A and B Follow)

Appendix A

Falbo v. United States, 320 U.S. 549 (1944), came up under legislation [the Selective Service and Training Act of 1940] which contained no provision for judicial review of Selective Service orders. [320 U.S. at 554, 557.] Classified as a conscientious objector, Falbo was ordered by his local board to report for civilian alternative service. He refused to report, believing that he should have been classified as a minister, and was therefore exempt from all forms of national service. Criminal prosecution was brought, and the District Court, declining to hear the defense of misclassification, convicted him. The Court of Appeals affirmed. The Supreme Court granted certiorari and framed the question as follows:

> . . . whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

The Court answered this question in the negative, saying:

> The circumstances under which the Act was adopted lend no support to a view which would allow litigious *interruption of the process of selection* which Congress created. * * * Surely if Congress had intended to authorize interference with that process by *intermediate challenges of orders to report,* it would have said so. (320 U.S. at 554, emphasis added.)

The court observed that, under the procedure then used, the registrant was not tested for physical and

mental fitness until he reported for service, so that the process of selection was incomplete "until the registrant is accepted by the army, navy, or civilian public service camp." [320 U.S. at 553.] The Court also noted that "approximately forty per cent of the selectees who report under orders of local boards for induction into the armed forces are rejected . . ." [320 U.S. at 553, n. 7.]

Falbo holds simply that there can ordinarily be no judicial review of draft board orders until completion of the selection process. This interpretation is confirmed by *Estep v. United States,* 327 U.S. 114 (1946), where the Court held that judicial review was available to a registrant who had completed the selection process but had refused to be inducted.[1] Thus the essence of the *Falbo* decision is that the registrant must go to the brink of induction in order to obtain judicial review of the draft board order. Like the traditional concept of exhaustion of administrative remedies, the *Falbo* rule is aimed only at deferment of judicial review until the end of the administrative process.[2]

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[1]Since both *Falbo* and *Estep* had taken administrative appeals, there was no occasion for the Court to decide whether failure to have done so would have precluded judicial review.

[2]The Solicitor General describes *Falbo* as establishing that a registrant's failure "to exhaust his administrative remedies . . . precludes a challenge to the validity of his assigned classification in defense to a criminal prosecution". [Resp.Br. pp. 11-12.] The essential ambiguity in that description lies in the meaning of the phrase "exhaustion of administrative remedies". If it means following the selection process to its conclusion (going to the brink of induction) we are in agreement with the Solicitor General's interpretation. If it means, additionally, the filing of an administrative appeal during the selection process, we are in disagreement with the Solicitor General's interpretation. *Falbo* did not so hold; the issue was not even before the Court.

Appendix B

Yakus v. United States, 321 U.S. 414 (1944) involved the E
Emergency Price Control Act of 1942. The Act, adopte
d as a temporary wartime measure, provided for p
rice controls to be promulgated by a Price Administra
tor appointed by the President. It further provided: (
a) that any price regulation could be protested with
in 60 days after its issuance by filing a protest with
h the Administrator; (b) that upon denial of a protes
st, the person aggrieved could file a complaint in th
he Emergency Court of Appeals within 30 days therea
after to enjoin or set aside the regulation; (c) that re
eview of an adverse decision by that court could be so
ught by petition to the Supreme Court for certiorari; (d) that the Emergency Court of Appeals and the Su
upreme Court "shall have exclusive jurisdiction to
determine the validity of any regulation or order" of t
the Price Administrator; (e) *that no other court shall
l have such jurisdiction;* (f) that violations of regulati
ions or orders of the Price Administrator would be I
prosecuted in the District Courts.

In the
District Court Yakus was convicted under the Act fo
or selling at prices above maximum prices prescribed
d by the Administrator. Without having protested the
e pertinent regulations issued by the Administrato
or within the period prescribed by the Act, Yakus of
ffered to prove in defense of the criminal prosecutio
on that the regulations were invalid. The District C
Court, rejecting that offer on jurisdictional grounds,
found him guilty and the Court of Appeals

affirmed. On certiorari this Court also affirmed, holding that the review and enforcement procedure prescribed by the Act did not offend due process principles.

> There is no constitutional requirement that that test [of the validity of an administrative regulation] be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. [321 U.S. at 444.]

The following features, *inter alia,* distinguish *Yakus* from the case at bar:

1. The *Yakus* legislation was "a war-time emergency measure." [321 U.S. at 431-2.] The legislation here involved is not of that emergency character.

2. The *Yakus* legislation deprived the District Courts of jurisdiction to determine validity of the administrative order. The legislation here involved specifically confers jurisdiction on the District Courts to determine validity of the administrative order. [50 U.S.C. App. §460(b)(3).]

3. The *Yakus* legislation itself provided notice of the requirement of administrative protest and appeal. The legislation here involved, lacking any provision requiring a draft registrant to take an administrative appeal, provides no such notice.

4. The *Yakus* legislation affected businessmen, presumably sophisticated in legal matters and presumably assisted by legal counsel. The legislation here involved affects young men at age eighteen, unsophisti-

cated in legal matters and usually lacking access to legal counsel.

5. The *Yakus* legislation provided that the exclusive means of attacking validity of the administrative order was through protest filed with the Administrator and action in the Emergency Court of Appeals. The legislation here involved contains neither provision for exclusive review by administrative appeal, nor for judicial review of an administrative order by independent suit.

6. The *Yakus* legislation involved purely economic interests of persons affected. The legislation here involved affects personal liberty and to a substantial extent the right to life itself.